No. 7772

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE D. HUBBARD,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

WESTERN PRINTING COMPANY, SEATTLE, WASHINGTON

No. 7772

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE D. HUBBARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

WESTERN PRINTING COMPANY, SEATTLE, WASHINGTON

SUBJECT INDEX

Statement of the case. 3
Argument. 4
Assignments of Error. 4

TABLE OF AUTHORITIES CITED

Bird vs United States, 180 U. S. 356. . . . 4
Buchanan vs United States, 233 Fed. 257. . .15
16 Corpus Juris 1047. 14
16 Corpus Juris 963. 19
17 Corpus Juris 177. 4
20 Corpus Juris 416. 4
20 Corpus Juris 407. 6
20 Corpus Juris 433. 12
Lindgren vs United States, 250 Fed. 772. . 15
McDonald vs United States, 9 Fed.(2) 508. .15
Mendenhall, People vs, 135 Calif.344. . . . 4
Moore vs United States, 160 U. S. 268. . . 6
Peasley, State of Washington vs, 80 Wash.99 12 & 18
People vs Mendenhall, 135 Calif. 344. . . . 4
8 Ruling Case Law 60 PP. 11. 12
9 Ruling Case Law 1264. 6
Savitt vs United States, 59 Fed.(2) 541. . 14
State of Washington vs Peasley, 80 Wash.99 12 & 18
Thompson vs United States, 202 Federal 401
L. R. A. N. S. 206. 4
United States Customs Regulations 1931,
Sec. 187, Paragraph P. 9
United States, Bird vs 180 U. S. 356. . . .14
United States, Buchanan vs, 233 Fed. 257. .15
United States, Lindgren vs, 250 Fed. 772. .15
United States, McDonald vs, 9 Federal (2)
508. 15
United States, Moore vs, 160 U. S. 268. . . 6
United States, Savittys, 59 Fed. (2) 541. .14
United States, Thompson vs, 202 Federal
401, L. R. A. N. S. 206. 4
Wharton Criminal Law, Vol 2, Page 128. . . .4

STATEMENT OF THE CASE

The Appellant, George D. Hubbard, was indicted with several others for having entered into a criminal conspiracy (1) to embezzle property which had come into his possession and under his control by virtue of his official position as Collector of Customs for the United States Customs Collection District Number Thirty (30) and (2) to defraud the government of the United States by altering and falsifying certain official customs records. In a separate indictment he was alone charged with having converted to his own use and thereby embezzled eighty-four (84) quarts of intoxicating liquors which had come into his possession and under his control as Collector of Customs for Customs Collection District Number Thirty (30).

The two causes were joined for trial, and the jury returned a verdict of not guilty as to the conspiracy indictment and a verdict of guilty on the indictment charging embezzlement. From this latter verdict and the judgment and sentence based thereon, the defendant appeals.

In view of the skeleton record, which includes a statement as to what the evidence tended to prove, all of the instructions requested by the appellant, and the whole of the charge given by the court, the

appellant purposes to raise no matters except abstract questions of law: 17 Corpus Juris 177, *Thompson vs. United States*, 202 Federal 401, 41 L. R. A. N. S. 206; *People vs. Mendenhall*, 135 Calif. 344.

ARGUMENT

Assignments of Error

I.

The trial court erred in overruling the appellant's demurrer to the indictment because it fails to set out or to describe the crime of embezzlement with the requisite legal sufficiency. It is fundamental that a man cannot steal or embezzle his own property. That would be a contradiction in terms. If the accused has any legal interest in the property, even though it be jointly with another, he cannot be convicted of embezzlement in respect to such property. In brief, he cannot steal or embezzle from himself that which is already his own. (20 Corpus Juris 416). In pleading either larceny or embezzlement, it is essential that ownership of the property, either in whole or in part, in the accused, be negatived. (Wharton Criminal Law, Vol. 2, Page 128). In the indictment under consideration, there is no allegation negativing ownership in the accused. It was legally possible for the defendant in his official capacity, as Collector of Customs, to come into possession and control of his own property. Whereas the taking of that property

might constitute a breach of duty in office, yet it could by no means constitute the crime of embezzlement because he would be taking only that which was his own.

II.

The second assignment of error is predicated upon an instruction defining the limits of the crime of embezzlement, and specifically indicating what acts on the part of the appellant would bring him criminally within those limits as defined. The jury were instructed that "it was the defendant's duty as Collector of Customs, upon receipt of alcohol and intoxicating liquors which came into his possession and control, to cause the same to be destroyed unless such alcohol and intoxicating liquors could be used for official Government purposes *after* authority had been duly and regularly obtained from the Commissioner of Customs." (Tr. 28). They were further instructed that "if they found from the evidence that the defendant made *any* disposition of alcohol or intoxicating liquors other than (1) destruction of the same in *accordance with law* or (2) use of the same for Governmental purposes *after* authority had been duly and regularly obtained, then the appellant was guilty of the crime of embezzlement *as charged.*" (Tr. 29).

It is readily apparent upon even a most casual

reading of this instruction that it contains matter which cannot be justified by reason or logic, or be supported by any of the authorities. Briefly put—any possible use or disposition of alcohol or intoxicating liquors other than the two exceptions named (1) destruction according to the formula prescribed by the government or (2) use for governmental purposes *after* first complying with a requisite routine condition precedent—made the appellant an embezzler regardless of his intent, regardless of any loss to the owner or legal custodian of the property, and regardless of any conversion or unlawful appropriation to the use of the appellant himself.

There can be no quarrel as to the meaning of the term embezzlement. It is the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. (20 Corpus Juris 407). Ruling Case Law (9 R. C. L. 1264) defines it as the fraudulent conversion of another's personal property by one to whom it has been entrusted, with the intention of depriving the owner thereof, the gist of the act being usually the violation of relations of fiduciary character. In the leading case of *Moore vs. United States* (160 U. S. 268) the Supreme Court of the United States has said embezzlement is the fraudulent appropriation of property by a person to whom such

property has been entrusted or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Analyzing the authorities, it seems clear that embezzlement is a species of larceny or stealing. There are always three elements to the offense: (1) A fraudulent appropriation or conversion by the offender. (2) A loss or deprivation to the owner or custodian, and (3) A breach of trust or fiduciary relationship. Yet the meaning of embezzlement and an understanding of its component elements was completely lost sight of or overlooked in the instruction complained of. The trial court threw down the barriers and so enlarged the field that conduct which embraced none of the elements of embezzlement, or at most but one of them, was nevertheless held to constitute that crime.

Let us assume, for example, that the defendant had taken alcohol which had been seized by the United States Customs Officers, and without first writing to the Commissioner of Customs at Washington, D. C., as he was required to do by the regulations, he had it poured into the radiators of government cars to be used for "Anti-freeze", a usual

and permissible practice. The government would have lost nothing, the defendant would have appropriated nothing to his own use, and there would have been no breach of trust, merely a breach of a regulation respecting procedure,—still, under the court's instructions, the jury would have been required to find him guilty of embezzlement.

Or suppose that he took liquor which had been seized, and *before* obtaining authority from Washington, D. C., he delivered that liquor, or a portion thereof, to the United States Coast Guard, or the United States Coast and Geodetic Survey, to be used for governmental purposes. Here again there would be no loss to the government, there would be no appropriation by the defendant, or by anyone on his behalf, and there would be no breach of his trust; and yet the jury would be compelled to find him guilty as an embezzler because he had first failed to obtain authority from a superior officer for lawful disposition of the liquor. A moment's thought will indicate to what absurd lengths this would lead us were the instruction correct. Assume that after the defendant had made such a disposition of the alcohol or intoxicating liquor, he had written to the Department and his act had been ratified by the Commissioner of Customs. Under the charge, he would be an embezzler before ratification and would be purged of his crime by such ratification, a possible

situation in view of the instruction but both a logical and legal absurdity.

The customs regulations promulgated pursuant to the passage of the Tariff Act of 1930 required that all liquor seized be destroyed in the presence of two (2) witnesses both of whom were required to sign a certificate of destruction (United States Customs Regulations 1931, Section 187, Paragraph P). The trial court told the jury that these regulations were in effect throughout the period covered by the indictment, and that they had the force and effect of law. Therefore, destruction in the presence of only one witness, or a failure to properly vouch for a destruction in a certificate, would not be a destruction *in accordance with law;* yet, although the liquor was actually destroyed by a representative of the government in the presence of one witness, and although the defendant did not appropriate to his own use or the use of anyone else a single drop of it, still the jury would be under the duty of finding him guilty of the crime of embezzlement.

In short, even though the defendant committed no act more serious than the breach of a regulation, and even though that breach did not result in any loss to the government or any gain to the defendant or in any violation of trust, yet he must be found guilty of the crime of embezzlement, *as charged.*

A mere statement of the proposition suffices to demonstrate that it is completely unsound; and the government can advance no authorities in support of the court's pronouncement. To seriously contend that there can be a theft when there is no loss by anyone, to urge that a government can be embezzled of property which never leaves its possession or control, and which it actually uses and destroys by its own officers or agents, not only does violence to reason but also renders meaningless the books and the language. A glance at the record indicating what the evidence tended to prove (Tr. 14 and 15) shows not only testimony as to conversion but also delivery to the United States Coast Guard and to the United States Coast and Geodetic Survey and in addition, destruction of alcohol and intoxicating liquors. Although the charge was undoubtedly correct in so far as it appertained to the conversion, it was just as incorrect when applied to delivery to other branches of the same governmental department or to the destruction. Since no one can say upon which act the jury relied in reaching its verdict, the instruction must be correct as an abstract proposition of law before it can stand. It is respectfully submitted that its incorrectness has been amply proven.

A brief examination of the crime, *as charged* by the indictment (Tr. 3), indicates that the defendant was accused of feloniously converting the property

to his own use and thereby embezzling it. There is nothing anywhere in the indictment, even remotely, accusing him of committing embezzlement by breaching the regulations which were to control destruction, disposal or use of government property. A reading of the particular statute involved clearly indicates that it is directed against embezzlement by wrongful conversion or fraudulent appropriation to one's own use, and makes no effort whatsoever to define as a crime or to punish a defect or an irregularity in proceeding to do that which was permissible and lawful under both the law and the regulations of the Treasury Department.

It may be argued that the trial court elsewhere in the charge correctly defined embezzlement. Even though that be true, yet that cannot cure the error committed. The court's charge must be considered as a whole. No part is inherently more important than any other, and no one is able to say to which portion a juror attached the greatest importance or what language influenced him the most in arriving at his verdict. Here the trial court, by the language complained of, fixed the limits of criminal responsibility. It descended from the general into the particular and specified what acts on the part of the defendant would bring him within the limits set and render him guilty of embezzlement. Such an error cannot be

cured by a subsequent general definition of the term embezzlement. (*State vs. Peasley*, 80 Wash. 99).

III.

The third assignment of error deals with the instruction respecting intent to defraud. It is hardly necessary to multiply authorities in support of the proposition that intent to defraud is an essential element of the crime of embezzlement or that the burden rests upon the prosecution of proving every essential ingredient of an accusation beyond a reasonable doubt. (8 Ruling Case Law 61 PP. 11). The rule is well put in 20 Corpus Juris 433—to constitute embezzlement, there must be as in larceny a fraudulent intent to deprive the owner of his property and to appropriate the same. Considerable confusion prevails in connection with the portion of the charge on intent (Tr. 36). The trial court apparently at the same time discussed intent as it pertained to both conspiracy and embezzlement; but nowhere in any of the charge does the court instruct that the government had to establish an intent to defraud beyond a reasonable doubt before it could find the appellant guilty of embezzlement, although the court in its definition of embezzlement did say that the wrongful appropriation had to be with intent to deprive the true owner thereof.

However that may be, the court declared that in-

tent to defraud *is* (not may be) presumed when the unlawful act is proved to have been knowingly committed. (Tr. 36.) In place of requiring proof of an essential element beyond a reasonable doubt, the court creates and substitutes a legal presumption therefor. The jurors are not permitted to draw their own conclusion as to the intent of the alleged wrongdoer. They are instructed that the law itself presumes an intent to defraud from an unlawful act. That, to all intents and purposes, means instead of the burden resting upon the government to prove a requisite specific intent, it was necessary only to show the commission of an unlawful act, and that thereafter it was incumbent upon a defendant to establish the absence of such an intent on his part. Such a doctrine not only overturns our whole theory of evidence but also does away with the presumption of innocence, supplanting it with a presumption of evil intent which a defendant must rebut.

Even a moment's reflection will reveal the absurdity of the instruction, "Intent to defraud is presumed when the unlawful act is knowingly committed." To what unlawful act does the court refer? What kind of an unlawful act is meant? There is a multitude of unlawful acts which can by no stretch of the imagination have any association with an intent to defraud. Yet under the language used, if the appellant

did any unlawful act, or breached some regulation of the department, the jury must under the law presume the presence of an intent to cheat or steal, even though the unlawful act resulted in no loss of or injury to the government or to anyone else. Certainly such an instruction is not only misleading and confusing, but it is also an erroneous declaration of the law.

The correct and approved rule is given in *Savitt vs. United States*, 59 Fed. (2) 541, wherein the appellate court says that intent to defraud is an element of the crime which must be proved. The trial court may not say whether there was such an intent. That is the function of the jury, to be determined by all the facts and circumstances, the only presumption being that every man intended the natural and probable consequences of his acts. But, surely, a trial judge has neither the right nor the power to relieve the prosecution of a burden which has always rested upon it, by the creation of a new legal presumption whose only merit is that of novelty and originality. He may not deprive the jury of its inherent and exclusive right to determine a question of fact which is decisive of the whole issue because an instruction which tends to exclude from the consideration of the jury a material issue is erroneous. 16 Corpus Juris 1047; *Bird vs. United States*, 180 U. S. 356.

Attention is called to the case of *McDonald vs. United States*, 9 Federal (2) 508, in which the defendant was accused of having entered into a conspiracy to injure and oppress. In the course of its opinion, the court said:

> "Intent in respect of the Federal right is an essential element of the offense charged. The legal quality and consequences of an act are not always apparent or definitely indicated. Some acts are of such an equivocal or ambiguous character that the judicial inquiry turns wholly upon the particular motive which may be disclosed by extrinsic evidence. *Buchanan vs. United States*, 233 Fed. 257."

A very instructive case on both the second and third assignments of error is *Lindgren vs. United States*, 250 Fed. 772, a decision of our own Circuit Court of Appeals. In reversing a conviction for embezzlement, the court quoted with approval the following language from a decision of the Supreme Court of Oregon.

> "Without a felonious and criminal intent on the part of the defendant, there could have been no crime although there may have been a breach of trust. This is a criminal prosecution and the conversion by the defendant must not have been only a tortious act, but it must have been with a felonious intention and this was a question of fact for the jury. If, as bailee, he refused to pay the money over but with no intention of converting it to his own uses, he cannot be convicted of the crime charged because in such a case there would be an entire absence of felonious or

criminal intent which is an essential ingredient of the crime."

In a criminal prosecution, every intendment is in favor of the innocence of the accused. Even where certain legal presumptions have been created by Congressional act, they have been but few and due to what seemed the necessities in prosecutions of certain kinds of crime. The trial court here exceeded its powers when it removed from the deliberation of the jury a question of fact by charging them that such question of fact was legally presumed from the commission of an unlawful act.

IV.

The fourth assignment of error is predicated upon an instruction which is repeated in slightly varying language. The court first instructed that it was not necessary that the defendant should enjoy the property or the use of it himself, that if he gave it to one not entitled to its use and enjoyment with intent to deprive the true owner thereof, or *permitted* such person to take it and use it and enjoy it with intent to deprive the true owner thereof, he was guilty of embezzlement. (Tr. 39.) Later the court said that if the defendant appropriated the liquor, or any of it, to his own use, or *permitted* others to do so with intent to deprive the true owners thereof, he would be guilty of embezzlement as charged. (Tr. 41.)

We are all familiar with the fundamental principle of criminal law that unless there is an act coupled with an evil intent, there is no crime. A person may possess the worst possible intent, no matter how vile or reprehensible, if that intent is not made manifest in conduct or action, there is nothing of which the state or government can take criminal cognizance. Assuming, without admitting, that the defendant had an intent to deprive the government of alcohol or intoxicating liquors, yet if that intent did not result in an act, then there was no crime or misdemeanor. However, if the instruction laid down is the law, if the defendant had such an intent, and *permitted* someone else to take government property then he by reason of another's act became equally guilty with him. In other words, one's bare intent coupled with another's act render both criminally responsible.

The court having given no definition or explanation of the word "permit," the jury were entitled, and no doubt expected to understand it in its plain, ordinary, everyday significance. Funk and Wagnall's Dictionary defines the primary meaning of permit as follows: "To allow by tacit consent or by not hindering; to take no steps to prevent." Webster's Dictionary defines permit in the following manner: "To consent to; to allow to be done; to tolerate." In

other words, permit in its ordinary everyday significance simply portrays, not conduct, but an attitude of mind wherein no action of any kind is taken. It never has been and it is not now the law that a person is criminally responsible for a state or attitude of mind when unassociated with an act. Certainly it is a far cry to say that permitting or taking no steps to hinder another in a commission of a crime renders him equally guilty with the perpetrator thereof.

An illuminating case is *State of Washington vs. Peasley, supra,* wherein the defendant was joined with certain others in an information charging grand larceny. The court instructed that in order to convict the defendant it was not necessary that the jury find that he personally stole the money, but if it was taken by either of his codefendants with his aid or *assent,* with intent to deprive the loser thereof, then he would be just as guilty as though he himself had taken it.

In interpreting the statute respecting aiding, abetting, counselling, encouraging, commanding, or otherwise procuring another to commit a crime making such a person a principal, the Supreme Court said,

> "Each of the words used in this statute upon which a criminal charge can be predicated signifies some form of overt act; the doing or

> saying of something that either directly or indirectly contributes to the criminal act; some form of demonstration that expresses affirmative action, and not mere approval or acquiescence, which is all that is implied in assent. To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental atitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act."

We submit that the *Peasley* case is on all fours with the instant one, and that the decision in the two must be identical.

V.

With respect to assignments VIII and IX briefly it may be said, it is fundamental that a court must, in order to accord any defendant a fair and intelligent trial, instruct on every essential question of the case so as to properly advise the jury of the issues involved. The object of the instructions is to correctly define for the jury and to direct their attention to, the legal principles which apply to and govern the facts. Hence the charge must be full (in the sense of complete), clear and explicit, giving to the jury all the law in so far as it relates to all the issues. (16 Corpus Juris 963.) Now the issues here have of necessity been framed and determined by the statute alleged to have been violated,

and the formal accusation or indictment charging the violation. The statute itself is confined and limited to the words "embezzle or wrongfully convert to his own use" and the indictment charges in the language of the statute "did unlawfully convert to his own use and thereby embezzle."

It is readily apparent that the significant language, the indispensable words are "wrongfully convert" and "embezzle." Both have a definite, well recognized, fully established legal meaning. Without a clear exposition of their legal significance, without a thorough understanding of their meaning, especially of conversion—which has both civil and criminal aspects—no jury could know how to interpret the law and apply it to the facts. Yet nowhere in the court's charge is there any definition or explanation of the meaning or import of the legal phrase "wrongful conversion." With respect to a crime which can be charged and committed in only two ways and which is pleaded in only one of those ways, unlawfully convert, the court fails wholly to instruct on that phrase, and leaves the jury in darkness as to the legally approved and accepted criminal significance of such a charge or accusation.

VI.

Because of the law and authorities above set out,

the District Court erred in denying the defendant's motion for a new trial, and in pronouncing judgment upon him.

CONCLUSION

It is respectfully submitted that the trial court erred in the particulars above stated and that the case should be reversed.

Respectfully submitted,

ANTHONY SAVAGE
JOHN J. SULLIVAN
H. SYLVESTER GARVIN.